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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1973

No. 73-1270

ETCHEBE C. KELLEY,
Petitioner,

v.

SOUTHERN PACIFIC COMPANY, a corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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(2) Does Federal Rule of Civil Procedure 52(a) preclude the appellate court from reversing the district court's factual conclusion unless the evidence failed, completely, to support the district court's findings?

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In the Supreme Court
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OCTOBER TERM, 1973

No.

EUGENE C. KELLEY,
Petitioner,

vs.

SOUTHERN PACIFIC COMPANY, a corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on June 29, 1970. A Petition for rehearing pursuant to Federal Rules of Appellate Procedure 35(b) was denied November 21, 1973.

I

OPINIONS BELOW

The Findings of Fact and Conclusions of Law by the District Court, filed June 29, 1970, are unreported. They are reproduced in Appendix A to this petition. The opinion of the Court of Appeals is reported at 486 F.2d 1084 (9th Cir. 1973) and is reproduced in Appendix B to this petition.

II

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals was entered September 7, 1973 and is reproduced in Appendix B to this petition. A Petition for Rehearing was denied November 21, 1973 (copy of denial is attached as Appendix C). This Court has jurisdiction to review the judgment herein by Writ of Certiorari under 28 U.S.C. §1331 and 45 U.S.C. §51.

III

QUESTIONS PRESENTED FOR REVIEW

(1) Can an employee of an independent contractor, performing unskilled railroad work which is the contractual and franchise responsibility of Southern Pacific Railroad, which is under that railroad's supervision and control and which uses that railroad's equipment and work area, be an "employee" of that railroad within the meaning of F.E.L.A.?

(2) Does Federal Rule of Civil Procedure 52(a) preclude the Appellate Court from reversing the District Court's factual conclusion unless the evidence failed, completely, to support the District Court's findings?

IV

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Code:

Title 45, Section 51:

Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence, definition of employees.

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such in whole or in part from the negligence of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines,

appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

Title 28, Section 1331(a):

"(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

Title 28, Section 1254(1)

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

Title 28, Supreme Court Rules, Rule 19(1)(b):

"1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

"(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

V

STATEMENT OF CASE

Petitioner, Eugene C. Kelley, now a paraplegic, was injured July 3, 1963 when he fell from the top level of a three level railroad car while unhooking automobiles situated on the railroad car. At the time of the accident, petitioner was employed by Pacific Motor Trucking Company, a wholly owned subsidiary of Southern Pacific,[1] who had been engaged by Southern Pacific Company to unload automobiles from its railroad cars.

The rate which Southern Pacific could charge for transporting the automobiles included unloading of the automobiles (see Findings of Fact, No. IV, see,

[1]No argument is being made that the Court should "pierce the corporate veil." Under the facts of this case, the result should be the same if PMT had no legal relationship with Southern Pacific.

also, admission by Southern Pacific dated January 10, 1968 set forth on page 147 of Record on Appeal, attached hereto as Appendix D).

Petitioner had been doing this exact, unskilled job at the same location for eight years. The location and equipment was owned and controlled by Southern Pacific (see Findings of Fact. Nos. III, VI).

The responsibility for supervising and controlling the unloading operation was that of Southern Pacific Company (see Findings of Fact, Nos. VIII, VII, V).

Southern Pacific moved for Summary Judgment re questions of "employee" status and the motion was denied October 7, 1969.

The parties waived trial by jury and agreed to have the District Court act as trier of fact.

The trial court, as trier of fact, found that the petitioner was an "employee" of Southern Pacific Company for purposes of F.E.L.A. relying on Restatement, Agency 2d, §220 (see Appendix E) as provided in *Baker v. Texas & Pacific Railroad,* 359 U.S. 227 (1959); *Ward v. Atlantic Coast Line,* 362 U.S. 396 (1960); and *Smith v. Norfolk & Western Railway Company,* 407 F.2d 501 (4th Cir. 1969) (see Findings of Fact and Conclusions of Law, Appendix A).

VI

REASONS FOR GRANTING WRIT OF CERTIORARI

A. THE COURT OF APPEALS DECISION IGNORED APPLICABLE DECISIONS OF THIS COURT.

The Court of Appeals decision is directly contrary to this Court's decisions in *Ward v. Atlantic Coast Line,* 362 U.S. 396 (1960); *Baker v. Texas & Pacific Railroad,* 359 U.S. 227 (1969); *Smith v. Norfolk & Western Railway Co.,* 407 F.2d 501, cert.denied 395 U.S. 969; *Bryne v. Pennsylvania R.Co.,* 262 F.2d 906, cert.denied 359 U.S. 960.

The United States Court of Appeals for the Ninth Circuit, in reversing the trial court's opinion, stated:

> "Thus, the F.E.L.A. is applicable only when a common law master-servant relationship exists between the railroad and the person injured by its negligence. The relationship of principal and agent, which the court as trier of fact found and upon which it relied in this case does not suffice."

This holding was not supported by a single citation and is directly contrary to all existing cases of this Court and Courts of Appeals which have considered the issue.

In *Baker v. Texas & Pacific Railroad Co.,* 359 U.S. 227, 228 (1959), this Court stated:

> "The Federal Employers Liability Act does not use the terms 'employee' and 'employed' in any special sense, . . . we think it perfectly plain that the question, like that of fault or of causation under the Act, contains factual elements such as to make it one for the jury under appropriate instructions as to the various relevant factors

under law. See Restatement Agency 2d §220, comment c; § 227, comment a."

In *Ward v. Atlantic Coast Line,* 362 U.S. 820, the injured party was paid by an independent contractor. This Court, in reversing the Court of Appeals, held: (1) that the question of "employee" status was a jury question based on Restatement of Agency, §220. This Court stated:

> "However, we agree with petitioner's alternative contention that the trial judge erred in refusing to instruct the jury as requested by petitioner, . . . as to the factors to be considered by the jury in determining whether petitioner was an employee of the railroad during the performance of the work within the meaning of the Act. . . . The parties' characterization is but one factor to be considered among others, see Restatement, Agency 2d §220(2(i) and the issue is one for determination by the jury on the basis of all relevant factors. Baker v. Texas & P.R.Co., 359 U.S. 227, 3 L.ed.2d 756, 79 S.Ct. 664, supra. Reversed."

The District Court, in relying on *Ward v. Atlantic* and Restatement, Agency §220 (see Appendix A), made the following Findings of Fact:

> "IV The unloading of automobiles, the work being performed by plaintiff, at the unloading ramp of Southern Pacific Company was the responsibility of Southern Pacific Company, to be performed by it through its agents in the regular course of its business pursuant to its contractual responsibilities to the shipper and its tariff responsibilities.

> "V At all times relevant to the unloading of the automobiles, Pacific Motor Trucking Co. in the unloading of the automobiles at the Southern Pacific Company ramp was acting as the agent of Southern Pacific Company.
>
> "IX The work being performed by plaintiff on July 3, 1963 was in fulfillment of a non-delegable duty of defendant Southern Pacific Company which brought plaintiff within the traditional agency relationship, and in such relationship to defendant Southern Pacific Company as to be covered by the Federal Employers Liability Act."

Restatement, Agency §220 provides:

> "A servant is a person employed to perform services *in the affairs of another,* and who with respect to the physical conduct, and the performance of the services is subject to the others control or *right* to control" [emphasis added].

To determine F.E.L.A. "employee" status, the *right* to control, even though that right is not exercised is sufficient *(Missouri-Kansas-Texas Railway Co. v. Hearson, infra,* at 1041-42; *Cimorelli v. New York Central R.Co.,* 148 F.2d 575, 577-78).

Petitioner has argued only that he was an "employee" of Southern Pacific Railroad within the meaning of F.E.L.A. according to the test set down by the United States Supreme Court in *Baker v. Texas & Pacific Railroad Co.,* 359 U.S. 227 (1959), namely Restatement, Agency 2d, §220 (reproduced as Appendix E), and *Ward v. Atlantic Coast Line,* 362 U.S. 396 (1960).

The District Court, in the case at bar, specifically relied on Restatement of Agency 2d, §220 which deals with the *master servant* relationship, and on *Baker v. Texas & Pacific Railroad Co.,* 359 U.S. 227, which expressly provides that the issue of "employee" status under F.E.L.A. is a factual issue to be determined by the application of the above Restatement (see Findings of Fact, Appendix A).

Also, the F.E.L.A. was amended in 1939 to encompass those persons who were performing interstate work and thus were defined as "being employed".[2] The District Court specifically found that petitioner was performing work "in fulfillment of a non-delegable duty of defendant Southern Pacific Company".

The District Court not only found the test of Restatement, Agency §220 had been met by the evidence but also the spirit and intent of the legislature in providing coverage to injured persons who "in any way directly or indirectly affect such commerce."

This Supreme Court has, on two previous occasions, supported the very factual and legal conclusion reached by the District Court in the case at bar (see *Smith v. Norfolk & Western Railway Co.,* 407 F.2d 501, cert. den. 395 U.S. 969; *Bryne v. Pennsylvania R.Co.,* 262 F.2d 906, cert.den. 359 U.S. 960).

In *Smith v. Norfolk, supra,* the injured party fell while unloading autos from a tri-level auto carrier.

[2]"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate . . . commerce; or shall, in any way directly or indirectly or closely and substantially, affect such commerce . . . shall . . . be considered as being employed by such carrier. . . ." (Aug. 11, 1939, c. 685, 53 Stat. 1404).

The Court of Appeals, in the case at bar, recognized the facts and issues were identical to *Smith v. Norfolk, supra,* yet held directly to the contrary.[3]

In referring to *Smith v. Norfolk & Western, supra,* the Court of Appeals, in the case at bar, failed to note in its citation that certiorari had been denied by the Supreme Court of the United States.

In *Bryne v. Pennsylvania R.Co.,* 262 F.2d 960, cert. den. 359 U.S. 960, the injured party was an employee of Western Electric Corp. who died while performing a one time duty of repairing a locomotive previously purchased by Penn R. Co. from Western Electric Corp.

It is submitted, the Court of Appeals, in the case at bar, not only reached an erroneous conclusion, but also misstated the record and failed to consider decisions of this Court which were not only applicable but *clearly* controlling.

B. THE COURT OF APPEALS INTENTIONALLY MADE A CONFLICT IN CIRCUIT COURT OPINIONS.

As set forth above, the Court of Appeals recognized the holding in *Smith v. Norfolk & Western, supra,* as being legally and factually identical.

The Court of Appeals, by ruling directly to the contrary, without supporting authority, intentionally created a conflict in Court of Appeals decisions.

[3]The Court stated: "Rather, the Court adopted a special concept of 'employment' for F.E.L.A. purposes that has found favor with the Court of Appeals for the Fourth Circuit in a case that is not significantly different from this case. Smith v. Norfolk & Western R. Co., 4th Cir., 407 F.2d 501."

Furthermore, in citing *Smith v. Norfolk & Western, supra,* the Court of Appeals ignored that portion of the citation showing this Supreme Court had refused to review the conclusion reached in *Smith v. Norfolk & Western.*

The Court of Appeals failed to mention why the District Court's reliance on *Ward v. Atlantic Coast,* supra, and *Baker v. Texas & Pacific Railroad Co.,* was erroneous despite these two decisions being the only U.S. Supreme Court decisions referred to by the District Court.

The Court of Appeals, in the case at bar, has invited a review of this Court's decision in *Smith v. Norfolk & Western* at the expense of petitioner.

C. DOES FEDERAL RULE OF CIVIL PROCEDURE 52(a) PRECLUDE THE APPELLATE COURT FROM REVERSING THE DISTRICT COURT'S FACTUAL CONCLUSION UNLESS THE EVIDENCE FAILED, COMPLETELY, TO SUPPORT THE DISTRICT COURT'S FINDINGS?

Federal Rule of Civil Procedure 52(a) restricts Appellate review of factual questions to those situations where there is a *complete* absence of evidence to support the District Court's findings *(Dennis v. Denver,* 375 U.S. 208, 210; *Atlantic & Gulf v. Ellerman Lines,* 369 U.S. 355, 359; *DeTorre v. Great Atlantic & Pacific Tea Company,* 411 F.2d 613).

Appellate review of questions of fact "must be quite restricted", and findings must stand unless

clearly erroneous *(Commissioner v. Duberstein,* 363 U.S. 278, 290-91).

The Court of Appeals not only failed to recognize that "employee" status is a question of fact but also failed to comment on the evidence or failure of the evidence to support the Findings.

Such Appellate review directly contravenes FRCP 52(a) and ignores the mandate of this Court which has clearly directed that "employee" status under F.E.L.A. is a question of fact (see *Baker v. Texas & Pacific R.Co.,* 359 U.S. 227; *Ward v. Atlantic Coast Line, supra).*

D. THE COURT OF APPEALS DECISION IS CONTRARY TO OTHER COURT OF APPEALS DECISIONS.

In addition to the acknowledged conflict with *Smith v. Norfolk, supra,* the case at bar is an anomaly for its being the first appellate reversal of a District Court's factual conclusion re "employee" status under F.E.L.A.

This decision is in direct conflict with decisions rendered in the 3rd, 4th, 6th, and 10th Circuits. All of these circuits relied on the very same authorities that were relied on by the District Court in the case at bar.

In addition to the Fourth Circuit decision in *Smith v. Norfolk, supra:*

1. In *Missouri-Texas Railway Co. v. Hearson* (CA 10th Cir.) 422 F.2d 1037 (1970) [the injured party was an employee of an independent contractor which contracted with the railroad to clean railroad cars].

2. *Bryne v. Pennsylvania R.Co.* (CA 3rd Cir.) 262 F.2d 906, cert.den. 359 U.S. 960 [employee of Westinghouse Electric Corp. died while working on locomotive purchased by Penn.R.Co.].

3. *Pennsylvania R.Co. v. Baralian* (CA 6th Cir.) 172 F.2d 710 [employee of independent contractor which had contract to unload with defendant railroad].

4. *Pennsylvania R.Co. v. Roth* (CA 6th Cir.) 163 F.2d 161 [employee of independent contractor which had contract to unload with defendant railroad].

5. *Cimorelli v. New York Central R.Co.* (CA 6th Cir.) 148 F.2d 575 [employee of independent contractor which had contract to unload with defendant railroad].

VII

CONCLUSION

The Court of Appeals, in the case at bar, has placed petitioner in a position of not having a right of review by this Court under circumstances which cry out for review. The petitioner has suffered severe injuries and under the law, aside from this Court of Appeals' decision, clearly is entitled to compensation.

The District Court, as trier of fact, applied the correct test in reaching its conclusions.

The Court of Appeals ignored the correct test to be applied both as to this case and under appropriate rules of appellate review.

The Court of Appeals decision should be vacated to create conformity and unanimity among the Circuits and avoid the anomaly created by this decision.

Dated, San Francisco, California,
February 14, 1974.

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Attorneys for Petitioner.

(Appendices Follow)

Appendix A

In the United States District Court
for the Northern District of California

Eugene C. Kelley,	Plaintiff,
vs.	
Southern Pacific Company, a corporation,	Defendant.

[Filed—Jun 29 1970]

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

From the record and the evidence the court finds:

FINDINGS OF FACT

I. Plaintiff, Eugene C. Kelley, was injured July 3, 1963, at the multi-level railroad car loading and unloading ramp of defendant, Southern Pacific Company, at 4th and Channel Streets, San Francisco, California. At such time and place, plaintiff, along with three other persons, was unchaining new automobiles for unloading when he fell from the third level of a tri-level railroad car.

II. Plaintiff and the three men he was working with at the time of his fall were hired, paid by and could be discharged by Pacific Motor Trucking Company and were in the employment of Pacific Motor Trucking Company.

III. Plaintiff had been employed at this particular job (unloading of automobiles for the Southern Pacific Company) and location on a full time basis for a period of eight years and he was paid for his services on an hourly basis.

IV. The unloading of automobiles, the work being performed by plaintiff, at the unloading ramp of Southern Pacific Company was the responsibility of Southern Pacific Company, to be performed by it or through its agents in the regular course of its business pursuant to its contractual responsibilities to the shippers and its tariff responsibilities.

V. At all times relevant to the unloading of the automobiles Pacific Motor Trucking Company in the unloading of the automobiles at the Southern Pacific Company ramp was acting as the agent of Southern Pacific Company.

VI. The record is not clear as to who supplied the hammers and ratchet wrenches used by the plaintiff in his unloading operations. The record is clear and the court finds Southern Pacific Company supplied the necessary ramps and working area required to perform the unskilled work being performed by plaintiff at the time of the injury in question.

VII. Southern Pacific Company employees had the responsibility to and were required to daily check the safety of the tri-level cars and the safety railing thereof and to make all necessary repairs.

VIII. The responsibility for immediate supervision and control of the unloading operations here in

question was that of Southern Pacific Company, even though the exercise thereof was executed by employees of Pacific Motor Trucking Company, who in such work were acting as agents of Southern Pacific Company.

IX. The work being performed by plaintiff on July 3, 1963 was in fulfillment of a non-delegable duty of defendant Southern Pacific Company which brought plaintiff within the traditional agency relationship, and in such relationship to defendant Southern Pacific Company as to be covered by the Federal Employers' Liability Act.

CONCLUSIONS OF LAW

I. At the time and place of this accident the work being performed by Eugene C. Kelley involved a non-delegable duty of the Southern Pacific Company which brought plaintiff within the traditional agency relationship to Southern Pacific Company and in such relationship to Southern Pacific Company as to be covered by the Federal Employers' Liability Act.

II. This court has jurisdiction under the Federal Employers' Liability Act, 45 U.S.C. § 51 et seq.*

Dated: June 29, 1970.

/s/ Alfonso J. Zirpoli
United States District Judge

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*In making the above findings of fact and conclusions of law the court gave consideration to the rulings in *Baker v. Texas and Pacific Railroad*, 359 U.S. 227 (1959); and *Ward v. Atlantic Coast Line*, 362 U.S. 396 (1960); and *Smith v. Norfolk & Western Railway Company*, 407 F.2d 501 (1969); Restatement, Agency 2d, Section 220.

Appendix B

United States Court of Appeals
for the Ninth Circuit

Eugene C. Kelley, Appellee, vs. Southern Pacific Company, a corporation, Appellant.	No. 71-2262

[September 7, 1973]

Appeal from the United States District Court
for the Northern District of California.

Before: HASTIE,* BROWNING and WRIGHT, Circuit Judges.

HASTIE, Circuit Judge.

This is an appeal by Southern Pacific Co., a railroad, from a money judgment recovered by Eugene Kelley, a workman, in an action for negligent injury under the Federal Employers' Liability Act, 45 U.S.C. §1.

The only matter in dispute is whether the relationship between Kelley and Southern Pacific was such as to bring the tort in suit within the coverage of the

*The Honorable William H. Hastie, senior United States Circuit Judge of the Third Circuit, sitting by designation.

F.E.L.A. By agreement of the parties, the issues, factual as well as legal, upon which liability depended were tried to the district court without a jury. After an evidentiary hearing the court entered findings of fact and conclusions of law and imposed liability on the railroad.

The controlling language of the F.E.L.A. makes a "common carrier by railroad . . . liable in damages to any person suffering injury [as a result of the railroad's negligence] while he is employed by such carrier . . . ." The disputed question here is whether Kelley was "employed by" Southern Pacific within the meaning of the statute.

Kelley was seriously injured while he was engaged in unloading automobiles from a Southern Pacific trilevel flat car after the arrival of the shipment at its San Francisco destination. In the language of the district court's finding of fact, amply supported by the evidence: "Plaintiff and the three men he was working with at the time of his fall were hired, paid by and could be discharged by Pacific Motor Trucking Company and were in the employment of Pacific Motor Trucking Company".[1] That company is a motor common carrier that operates over 15,000 route miles in the western states. Although all of its stock is owned by Southern Pacific, the Trucking Company functions as a distinct entity. Neither in the district court nor on this appeal has a case been made for piercing the corporate veil and disregarding the sepa-

[1]As a result of the accident Kelley had applied for and was awarded as a Trucking Company employee, full workmen's compensation benefits for total disability.

rate legal and functional identity of the Trucking Company. *Cf. Fawcett v. Missouri Pac. R.R.*, W.D. La. 1965, 242 F.Supp. 675, *aff'd. per curiam* 5th Cir. 1965, 347 F.2d 233, *cert. denied* 382 U.S. 907.

The relevant Southern Pacific tariff enabled a shipper of new automobiles by rail to take delivery either before or after the "grounding" of the automobiles. In this case the shipper had elected to have the automobiles grounded before delivery and had paid Southern Pacific a standard added charge for this unloading service.

The Trucking Company contracted with Southern Pacific to perform for specified unit prices such unloading of automobiles from railway cars as the railroad should require. Thus, in the unloading operation, Kelley was both performing his normal work for and assigned to him by his regular employer, the Trucking Company, and at the same time enabling the railroad to discharge its contractual responsibility to the shipper. Appropriately, Kelley was a member of the Teamsters union and not of one of the railroad craft unions.

As stated above, the district court explicitly found that Kelley was an employee of the Trucking Company. Moreover, after considering the evidence on control and supervision, the court declined to make a finding proposed by the plaintiff that Kelley was an employee of Southern Pacific. Thus, the court did not find or proceed on the basis that Kelley was either a borrowed servant, temporarily in the employment of Southern Pacific, or that he was a servant in the

employ of both companies. Rather, the court adopted a special concept of "employment" for F.E.L.A. purposes that has found favor with the Court of Appeals for the Fourth Circuit in a case that is not significantly different from this case. *Smith v. Norfolk & W. Ry.*, 4th Cir. 1969, 407 F.2d 501.

The district court reasoned, adopting the Fourth Circuit analysis, that, under its contract with the shipper, the railroad was legally obligated to have the automobiles unloaded from its cars and that in performing that work the "employees of Pacific Motor Trucking Company . . . were acting as agents of Southern Pacific Company." This led to the court's conclusion of law that "[a]t the time and place of this accident the work being performed by Eugene C. Kelley involved a non-delegable duty on the Southern Pacific Company which brought plaintiff within the traditional agency relationship to Southern Pacific Company and in such relationship to Southern Pacific Company as to be covered by the Federal Employers' Liability Act". Thus, the district court, not persuaded by the evidence that Kelley was a servant or an employee of Southern Pacific in common law conception, concluded that the "agency relation" which resulted from Southern Pacific's contracting with Kelley's employer to perform Southern Pacific's "non-delegable" contractual duty to its shipper sufficed to bring Kelley's status vis-à-vis the railroad within the F.E.L.A.

Our difficulty with this analysis begins with what the Supreme Court said in the leading case of *Baker v. Texas & Pac. Ry.*, 1959, 359 U.S. 227, 228:

> "The Federal Employers Liability Act does not use the terms 'employee' and 'employed' in any special sense, Robinson v. Baltimore & Ohio R. Co., 237 U.S. 84, 94, so that the familiar general legal problems as to whose 'employee' or 'servant' a worker is at a given time present themselves as matters of federal law under the Act."

Thus, the F.E.L.A. is applicable only when a common law master-servant relationship exists between the railroad and the person injured by its negligence. The relationship of principal and agent, which the court as trier of fact found and upon which it relied in this case does not suffice.

We are reinforced in this view by consideration that, apart from the *Smith* case in the Fourth Circuit, considered decisions in this circuit and elsewhere have rejected the contention that employees of a contractor, engaged by a railroad to perform work that is the railroad's responsibility, become railroad employees *ipso facto. Dougall v. Spokane, P. & S. Ry.,* 9th Cir., 1953, 207 F.2d 843 (right of way maintenance work); *Norman v. Spokane, P. & S. Ry.,* D.Ore. 1950, 101 F.Supp. 350, *aff'd. per curiam* "for the reasons given in the district court's opinion", 9th Cir. 1951, 192 F.2d 1020 (railroad bridge repair); *Tarboro v. Reading Co.,* 3d Cir. 1968, 396 F.2d 941 (unloading coal cars); *Turpin v. Chicago, B. & O. Ry.,* Mo. 1966, 403 S.W.2d 233, *cert. denied,* 384 U.S. 1003 (unloading flat cars).

It also merits mention that years ago Congress considered and rejected a proposal to include companies that provide railroad accessarial services under the

F.E.L.A. In 1939, Congress amended the F.E.L.A., 53 *Stat.* 1404, and in the process considered various proposals. One proposal would have extended coverage to suppliers of accessorial services and their employees. Its rejection, after extensive committee hearings, was announced by the Senate Judiciary Committee in reporting the bill that ultimately passed:

> "The bill as introduced was intended to broaden the application of the act to include express, freight forwarding and sleeping-car companies. Upon the hearings it was clearly shown that there is neither necessity nor demand for the inclusion of these companies in the act. Therefore, they have been excluded from the substitute." S.Rep. No. 661, 76th Cong., 1st Sess.

The result which Congress deemed undesirable and, therefore, refused to legislate directly, should not, in our view, be achieved judicially by treating employees of contractors rendering accessorial services as if they were employees of the railroad when common law analysis has failed to yield that conclusion.

The judgment is reversed.

Office of the Clerk

United States Court of Appeals for the Ninth Circuit
U. S. Court of Appeals and Post Office Building
7th & Mission Streets, P. O. Box 547
San Francisco, California 94101

Re: No. 71-2262 Eugene C. Kelley

vs

Southern Pacific Company

Dear Sir:

An opinion in the above case was filed today, and pursuant to Rule 36 of the Federal Rules of Appellate Procedure a judgment was entered SEP 7 1973 REVERSED the judgment or order of the court below (or administrative agency).

Pursuant to Rule 41(a) the mandate of this court will issue 21 days after the entry of judgment, unless the court enters an order otherwise, or grants a stay of the mandate or a petition for rehearing is filed. If a petition for rehearing is filed and denied, the mandate shall issue 7 days after the entry of the order denying the petition.

Very truly yours,

Clerk

U.S. Court of Appeals

Appendix C

United States Court of Appeals
for the Ninth Circuit

No. 71-2262

Eugene C. Kelley, Appellee,

vs.

Southern Pacific Company, a corporation, Appellant.

[Filed Nov. 21, 1973]

ORDER

Before: HASTIE,* BROWNING, and WRIGHT, Circuit Judges

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing in banc.

The full court has been advised of the suggestion for in banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing in banc is rejected.

Dated: November 21, 1973

*Honorable William H. Hastie, Senior Judge, United States Court of Appeals for the Third Circuit, sitting by designation.

Appendix D

R. Jay Engel, Esq.
Jarvis, Miller & Stender
123 Second Street
San Francisco, California 94105
Telephone: 982-9617
Attorneys for Plaintiff

In the United States District Court
for the Northern District of California

No. 45344

Eugene C. Kelley, Plaintiff,
vs.
Southern Pacific Company, a corporation, Defendant.

[Filed Jan. 10, 1968]

INTERROGATORIES PROPOUNDED BY PLAINTIFF TO DEFENDANT

TO: Defendant above named, and to CORRIGAN & ROY, its attorneys:

Pursuant to the provisions of California Code of Civil Procedure, Section 2030, you are requested to answer in writing and under oath the following interrogatories within 15 days from the time service is

made upon you. Please note that in answering these interrogatories you should furnish all information possessed by or available to the defendant, its representatives, investigators and attorneys.

1. In the deposition of Mr. Roy A. Hedlund on September 6, 1967, Mr. Hedlund stated that the rate charged by Southern Pacific Company in certain instances included the charge involved of setting the automobiles off of a tri-level auto carrier onto the abutting ground. Mr. Hedlund further stated that whether these charges are included or not depends on the point of origin and the point of destination. With regard to Mr. Hedlund's testimony, please set forth the following:

(a) What points of origin and what points of destination give rise to a charge made by defendant, SOUTHERN PACIFIC COMPANY, for the removing of automobiles from tri-level auto carriers as of July 5, 1963?

Corrigan and Roy
Attorney at Law
65 Market Street, Room 834
San Francisco, California 94105
Telephone: 362-1212
Extension: 22513
Attorneys for Defendant

In the United States District Court
for the Northern District of California

No. 45344

Eugene C. Kelley, Plaintiff,
vs.
Southern Pacific Company, a corporation, Defendant.

[Filed Sep. 17, 1968]

ANSWERS TO INTERROGATORIES

COMES NOW defendant, SOUTHERN PACIFIC COMPANY, a corporation, and answers those interrogatories heretofore proposed and propounded by plaintiff. The following answers have been prepared by Donald O. Roy, attorney and agent for said defendant and are based upon his information and belief from information available to said defendant at this time. The information supplied in these answers

has been obtaind from the files of said Donald O. Roy.

1) Contrary to Mr. Hedlund's impression, all rates for inbound movement of automobiles on tri-level cars in July of 1963 included the charge for including the automobiles without regard to the origin of the particular shipment.

2) Yes.

Appendix E

RESTATEMENT, AGENCY 2d

WHO IS A SERVANT

§ 220. Definition of Servant

(1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.

(2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

(a) the extent of control which, by the agreement, the master may exercise over the details of the work;

(b) whether or not the one employed is engaged in a distinct occupation or business;

(c) the kind of occupation with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

(d) the skill required in the particular occupation;

(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

(f) the length of time for which the person is employed;

(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is a part of the regular business of the employer;

(i) whether or not the parties believe they are creating the relation of master and servant; and

(j) whether the principal is or is not in business.